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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DARRYN KELLY et al., Plaintiffs and Respondents, v. KEITH RUTMAN, Defendant and Appellant.	D076022 (Super. Ct. No. 37-2018-00003161-CU-BC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Randa Trapp, Judge. Affirmed in part; reversed in part; remanded with directions.

Wingert Grebing Brubaker & Juskie, Andrew A. Servais, and Amy L. Simonson for Defendant and Appellant.

Joel G. Selik, in pro. per., as an interested party with permission from the Court of Appeal.

No appearance for Plaintiff and Respondent Darryn Kelly.

Attorney Keith Rutman defended Darryn Kelly against a temporary restraining order and then represented him during a portion of the subsequent appeal. The relationship soured, and Rutman withdrew his representation of Kelly. In the current litigation, Rutman sued Kelly in small claims court to recover fees he claimed Kelly owed. Kelly then sued Rutman for malpractice in superior court. The two cases were consolidated in superior court. The trial court denied Rutman's motion for sanctions under Code of Civil Procedure[1] section 128.7 but sustained his demurrer to Kelly's complaint without leave to amend.

Rutman appeals, contending the superior court abused its discretion in denying his motion for sanctions. In addition, he asserts the matter must be remanded to the superior court with instructions to include costs in the judgment.

We conclude the superior court did not abuse its discretion denying the motion for sanctions, but reverse the judgment for the limited purpose to allow costs to be entered in an amended judgment per the requirements of the Code of Civil Procedure and the Rules of Court.

FACTUAL AND PROCEDURAL BACKGROUND

In the fall of 2016, Rutman represented Kelly in a restraining order action brought by Kelly's ex-girlfriend, E.T. The court entered a restraining order against Kelly, and Rutman represented him in his appeal of that order. During the appellate matter, Rutman

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1 Statutory references are to the Code of Civil Procedure unless otherwise specified.

and Kelly's relationship broke down. As a consequence, Rutman's motion to withdraw as Kelly's counsel was granted.

On November 14, 2017, Rutman sued Kelly in small claims court to recover his fees that he claimed Kelly had not paid. In response, almost two months later, Kelly brought suit, in propria persona, against Rutman alleging three causes of action: breach of contract; breach of fiduciary duty, and constructive fraud. Specifically, Kelly alleged that Rutman: (1) had a sexual relationship with Kelly's then girlfriend, K.E.; (2) disclosed confidential information to K.E.; (3) improperly withdrew from representing Kelly; and (4) charged for appellate work he never performed.

On February 26, 2018, Rutman's counsel sent correspondence to Kelly requesting he dismiss his complaint because it lacked evidentiary and legal support. When Kelly did not dismiss the complaint, Rutman filed a demurrer and motion to strike the operative complaint. While the demurrer and motion were pending, attorney Joel Selik substituted in as the attorney of record for Kelly and filed an opposition to the demurrer.

The court sustained Rutman's demurrer on all causes of action, but granted leave to amend "to add a cause of action for legal malpractice, add facts to support the other causes of action and to allege specific facts to support punitive damages."

On May 30, 2018, before a first amended complaint was filed, Rutman's counsel sent Selik correspondence warning that a motion for sanctions would be filed in response to the first amended complaint if that complaint included the same false allegations that plagued the original complaint. Rutman's counsel also provided evidence he believed undermined the factual allegations in the original complaint. Selik responded to the

May 30 letter asking for additional information and a 30-day continuance so he could explore the matter further. Rutman's counsel declined the requested extension. Also, it is unclear what additional information Rutman's counsel provided, if any.

On June 1, 2018, Kelly filed a first amended complaint. The new complaint included allegations that Rutman committed malpractice and breached his agreement with Kelly by "[h]aving a sexual relationship with [Kelly's] girlfriend, disclosing confidential client information, submitting a bill for hours not actually worked, and other actions . . ."

On July 6, 2018, Rutman served Kelly with Rutman's motion for sanctions under section 128.7. Rutman also served written discovery on Kelly, to which Kelly provided verified responses.

On August 3, 2018, Rutman filed his motion for sanctions. Five days later, Rutman filed a demurrer to the first amended complaint.

On August 10, 2018, Selik substituted out as attorney of record for Kelly. On September 10, 2018, Selik filed an opposition to Rutman's motion for sanctions. Fifteen days later, Kenneth Flood substituted in as counsel of record for Kelly and filed an opposition to the motion for sanctions. Kelly did not file an opposition to the demurrer.

Ultimately, the court denied the motion for sanctions but sustained the demurrer without leave to amend.

The court entered a judgment of dismissal on March 19, 2019. On March 25, 2019, Rutman filed a memorandum of costs seeking $2,010.74. After the time to file a motion to tax costs expired, the clerk did not enter the costs sought by Rutman.

Rutman timely appealed. In Rutman's opening brief, he listed Selik as an interested party. Kelly did not file a respondent's brief. This court granted Selik's motion to file a responsive brief as an interested party because Rutman was seeking sanctions against him as well as Kelly. Selik then filed a respondent's brief.

DISCUSSION

I

MOTION FOR SANCTIONS

A. Rutman's Contentions

Rutman argues the superior court abused its discretion in denying the motion for sanctions under section 128.7. We disagree.

B. Background

In the first amended complaint, Kelly alleged six causes of action: (1) breach of fiduciary duties; (2) intentional infliction of emotional distress; (3) fraud; (4) breach of contract; (5) legal malpractice/negligence; and (6) breach of the covenant of good faith and fair dealing. The primary allegations of wrong doing supporting each cause of action were that Rutman engaged in sexual relations with Kelly's girlfriend at the time (K.E.), disclosed confidential client information, and billed Kelly for work he did not actually do.

In response to the first amended complaint, Rutman served Kelly with a motion for sanctions under section 128.7. After the expiration of the 21-day safe harbor period (see § 128.7, subd. (c)(1)), Rutman filed the motion. Rutman asserted "[t]he claims and other legal contentions in" the operative complaint "were brought for an improper

purpose" and "[t]he allegations and other factual contentions in" the operative complaint "do not have evidentiary support." In support of the motion, Rutman submitted a self-declaration wherein he stated that he did not have "any type of physical or romantic relationship with [K.E.]." In fact, the only time he ever met or talked with K.E. was in the fall of 2016 when she dropped a check off at his office on behalf of Kelly. Rutman also declared that he filed a small claims action to recover attorney fees incurred because he "actually worked on Mr. Kelly's behalf at rates agreed to in the retention agreement signed by me and Mr. Kelly."

Rutman additionally offered the declaration of K.E. in support of his motion. K.E. stated that she "dropped papers off at Mr. Rutman's law office" "[i]n the fall of 2016." K.E. spent "approximately three minutes dropping the papers off" and "spoke with Mr. Rutman briefly about the description of the man who served Mr. Kelly with the restraining order because I was present when Mr. Kelly was served." K.E. also explained that after her romantic relationship with Kelly ended, he accused her of having a sexual relationship with Rutman. K.E. declared "[n]ever have I ever had a sexual relationship [*sic*] Mr. Rutman."

Among other evidence submitted in support of the motion for sanctions, Rutman offered copies of text messages and emails between Kelly and K.E. In the texts, Kelly called K.E. derogatory names and accused her of having sex with Rutman. K.E. denied having any physical relationship with Rutman. In the email, Kelly accused K.E. of "still talking to my attorney." K.E. denied that she was talking to Kelly's attorney and stated she did not remember the attorney's name.

Rutman also submitted transcriptions of voicemail messages K.E. left Rutman. In the first message, K.E. identified herself to Rutman as the person who "dropped off some papers at [Rutman's] office one time" "last year." K.E. also told Rutman that Kelly was accusing her of "having sex with [Rutman]" and that she believed Kelly was "completely psychotic and delusional."

Selik filed an opposition to the motion for sanctions on behalf of himself. Selik argued that, in the motion for sanctions, Rutman simply filed declarations from Rutman and K.E. denying that they ever had a physical relationship. Selik claimed "[t]his is not proof; this is exactly what would be expected for [K.E.] and Rutman to claim." Selik also pointed out that Rutman admitted that he had disclosed confidential information to K.E., which he claimed that K.E. verified in an email. In addition, Selik framed the ending of the attorney-client relationship between Rutman and Kelly as follows: "Kelly believe[d] Rutman [was] sleeping with his girlfriend so Kelly confront[ed] Rutman. Naturally Rutman denie[d] this (he would deny this even if it wasn't true). The next thing Kelly [saw was] that Rutman [dropped] Kelly as a client, and then Rutman sue[d] Kelly for fees (did Rutman sue Kelly because he was owed fees?)." In regard to Rutman's invoice for legal fees, Selik argued "[t]he fact is that Rutman never billed until he was informed by [K.E.] of [Kelly's] belief of Rutman sleeping with [K.E.]"

In support of his opposition, Selik submitted responses to written discovery propounded on Kelly. In a response to a special interrogatory asking Kelly to state all facts to support his contention that Rutman had a sexual relationship with K.E., Kelly responded as follows:

"My belief that the affair existed is based on the fact that Rutman acknowledged in a phone conversation (in Oct of 2017) that he had informed [K.E.] that there had been a TRO granted against me. [K.E.] also verified via an email in the April/May 2017 timeframe, that she was aware of the award of a TRO, even though I had never mentioned this to her. This acknowledgment disproves both parties' claim that they had only been in contact one time in Nov of 2016 when [K.E.] dropped a check off to Rutman at his office on my behalf. . . . Furthermore, my belief that the affair exists is based on the outcome of my relationship with [K.E.], whom I believe is a sex addict and social deviant, with absolutely no moral compass to speak of. [¶] In October of 2017, I texted [K.E.] and accused her of having sex with Rutman. She indicated that they had only been in contact the one time that she had delivered a check to his office the previous year and didn't recall his name. She then proceeded to immediately forward my text messages onto Rutman. Within a few days, Rutman called me and told me that he had been contacted by [K.E.] and that I'd accused her of having an affair with him. [¶] My response was that she wouldn't have much reason to contact him if they hadn't actually been involved. He indicated that they weren't involved beyond her taking the check to [his] office the previous November. I said if that was the case, then there was nothing more to say about it and that I didn't think she should've contacted him in the first place. I immediately asked him if he'd indicated to her that the opposing party had won the TRO hearing against me. His response was 'yeah, I might have mentioned it to her at some point.' This was a clear admission by my attorney that he had in fact, been in contact with her beyond their initial meeting the previous November, but also that he had divulged privileged information to her about my hearing and the outcome of it. [¶] The acknowledgement of the TRO on [K.E.'s] part and the admission of Mr. Rutman's part that he disclosed this information to her, is clear confirmation that the two were in contact inappropriately beyond the context of their initial meeting and also that they were discussing legal matters that were personal to my original case. Based on my experience in a failed relationship with [K.E.], I have firsthand knowledge of her sexual promiscuity and infidelity, as these things were the cause of the breakup. It's more likely, given the circumstances surrounding their dishonesty about being in communication and that of [K.E.'s] infidelity/promiscuity, that the two were sexually involved, rather than they were not."

In responding to a special interrogatory asking him to describe the basis of his contention that Rutman billed him for work never done, Kelly stated that Rutman assured him that it would be more cost effective to pay him hourly instead of a flat fee of $5,000 for the appeal because Rutman was "already fully aware of all circumstances surrounding this case." Nevertheless, Rutman submitted an invoice that brought the total amount billed over $5,000, but only did so after Kelly accused K.E. and Rutman of having an affair.

After Rutman filed a reply to Selik's opposition, Flood substituted in as counsel of record for Kelly and filed a late opposition to the motion for sanctions. Kelly submitted no evidence in support of the opposition. Rather, he claimed "[f]alse assertions that [Kelly] lacks evidentiary support is irrelevant and meaningless at this stage in litigation. . . . [¶] . . . The Court is to assume all facts in a complaint are true. To file a sanctions motion for a baseless complaint prior to discovery is obviously untimely and sanctionable itself."

After entertaining oral argument as well as considering the motion for sanctions, oppositions, pleadings, and evidence submitted in support of and in opposition to the motion, the court denied the motion for sanctions.[2] The court explained: "Mr. Selik represents that there was some inquiry and also there are some—there's some factual support in that there's some evidence that [Rutman] may have disclosed information to

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2 At the same hearing, the court sustained Rutman's demurrer to the first amended complaint without leave to amend. No party is challenging the ruling on the demurrer here.

[K.E.] about the existence of the temporary restraining order, which may have been a violation of the attorney/client confidence and may have been some evidence that there was some type of relationship there."

In a subsequent minute order, the court further illuminated its reason for denying the motion. The court stated:

> "The court does not conclude, from the evidence and arguments submitted and the judicial restraint required under case law, that the First Amended Complaint is intentionally false, has no evidentiary support, and/or was filed for an improper purpose. (CCP § 128.7(b)(1) and (3); See, *Peake v. Underwood* (2014) 227 Cal.App.4th 428, 440-441, 448 [*Peake*]. . . . The fact that the court sustained the demurrer is not enough to warrant sanctions. (*Peake* at 448.)"

C. Applicable Law and Standard of Review

A party seeking sanctions must serve the opposing party with the sanctions motion before filing it. (§ 128.7, subd. (c)(1); *Martorana v. Marlin & Saltzman* (2009) 175 Cal.App.4th 685, 698.) Service of the motion starts the 21-day safe harbor period during which the opposing party may withdraw or correct the challenged pleading and thus avoid sanctions. (§ 128.7, subd. (c)(1); *Martorana*, at p. 698.) If the opposing party does not withdraw or correct the challenged pleading within the safe harbor period, the movant may then file the motion for sanctions. (§ 128.7, subd. (c)(1); *Martorana*, at p. 698.)

The court may impose sanctions for filing a pleading "primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." (§ 128.7, subds. (b)(1), (c).) It may also impose them if the pleading is legally or factually frivolous. (§ 128.7, subds. (b)(2)-(3), (c); *Peake*, *supra*, 227

Cal.App.4th at p. 440.) To obtain sanctions, the movant must show that the opposing party's conduct was objectively unreasonable. (*Id.* at p. 440.) "A claim is objectively unreasonable if 'any reasonable attorney would agree that [it] is totally and completely without merit.' " (*Ibid*.)

We review an order granting or denying a section 128.7 sanctions award under the abuse of discretion standard. (*Patel v. Crown Diamonds, Inc.* (2016) 247 Cal.App.4th 29, 37.) We presume the trial court's order is correct and do not substitute our judgment for that of the trial court. (*Shelton v. Rancho Mortgage & Investment Corp.* (2002) 94 Cal.App.4th 1337, 1345.) To be entitled to relief on appeal, the court's action must be sufficiently grave to amount to a manifest miscarriage of justice. (*Kurinij v. Hanna & Morton* (1997) 55 Cal.App.4th 853, 867 (*Kurinij*); see *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712 ["The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious."].)

D. Analysis

In the instant action, Kelly alleged three primary acts of wrongdoing by Rutman. He alleged Rutman had an intimate relationship with K.E., Rutman disclosed confidential information to K.E., and Rutman billed Kelly for work he did not do. Based on this conduct, Kelly alleged six causes of action. Rutman argues that the trial court abused its discretion in denying his motion for sanctions under section 128.7 because Kelly did not

submit *any* evidence to support two of the key allegations. In other words, Rutman argues that first amended complaint lacked evidentiary support.[3]

Initially, we observe that Rutman does not claim that Kelly did not offer evidence to support his allegation that Rutman disclosed confidential information. In one of his responses to the special interrogatories, Kelly indicated that Rutman admitted that he told K.E. about the restraining order against Kelly. Thus, Rutman focuses on the other two primary allegations— Rutman's alleged sexual relationship with K.E. and the improper billing.

Rutman insists adamantly, throughout his opening brief, that Kelly did not produce *any* evidence to support his claim that Rutman was having a physical relationship with K.E. Further, Rutman points to the evidence he provided in support of his motion for sanctions, essentially contending that he proved he never had any intimate relationship with K.E. To this end, Rutman emphasizes his declaration and K.E.'s declaration, in which both denied that they engaged in sex with each other. He also relies on portions of text messages between Kelly and K.E. where Kelly accused K.E. of having sex with Rutman and K.E. denied it. Additionally, Rutman cites to the transcript of a voicemail message K.E. left him indicating that Kelly was accusing her of having sex with Rutman and that Kelly was mentally unsound. However, none of this evidence necessarily establishes that Kelly offered no evidence to support his claim.

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3 Rutman raises multiple arguments why he believes the court abused its discretion in denying his motion for sanctions. That said, the foundation for each of these arguments is that Kelly offered no evidence to support the three key allegations.

Indeed, the court found there was some evidence to support the allegation that Rutman and K.E. had a physical relationship. At the hearing on the motion for sanctions, the court found that the evidence that Rutman told K.E. about the temporary restraining order against Kelly "may have been some evidence that there was some type of relationship there." Moreover, Kelly explained, in response to a special interrogatory that he believed Rutman and K.E. were having an affair based on his relationship and knowledge of K.E. Also, Kelly noted that when he confronted K.E. about her relationship with Rutman, K.E. claimed to not remember his name, but "immediately" forwarded his texts to Rutman. She also contacted Rutman by phone. K.E.'s communication with Rutman undermines her claim that she did not remember Rutman and could support the superior court's conclusion that "some type of relationship" existed between them. Although the evidence offered to support the claim that Rutman was having a sexual relationship with K.E. was not overwhelming, we agree with the superior court that there was enough evidence in the record to show Kelly's claim of an improper relationship between Rutman and K.E. did not lack evidentiary support.

In addition, we are not persuaded by Rutman's argument that Kelly did not provide any evidence of Rutman's improper billing. Again, Rutman asks this court to focus on the evidence he provided in support of his motion for sanctions. Below, he submitted his billing invoices, retainer agreements, his appellate brief in the restraining order case, and certain correspondence between Rutman and Kelly. However, the evidence Rutman provided does not negate the evidence Kelly provided to support his claim that Rutman billed him for work he did not do.

Although the superior court did not make any specific findings of fact regarding the improper billing allegation, the court found that the first amended complaint had evidentiary support. Therefore, we must infer factual findings to support the order. (See *Sammis v. Stafford* (1996) 48 Cal.App.4th 1935, 1942.) Below, evidence was submitted, by way of Kelly's response to a special interrogatory, that provides evidentiary support for the allegation that Rutman improperly billed Kelly. Kelly stated that Rutman assured him that it would be more cost effective to pay him hourly instead of a flat fee of $5,000 for the appeal because Rutman was "already fully aware of all circumstances surrounding this case." However, only after Kelly accused K.E. of having a sexual relationship with Rutman and K.E. conveyed as much to Rutman, did Rutman submit an invoice that brought the total billed over $5,000. Further, Selik represented to the court that he had reviewed Rutman's invoices and "there's no question that there is a valid argument that the billing was inappropriate, what Mr. Rutman did. I can review that bill—I have reviewed the billing and there are certainly valid questions on that." Again, although this is not the strongest evidence, in terms of a motion for sanctions under section 128.7, the evidence was sufficient to support the court's denial of the motion.

In summary, we reject Rutman's claim that there was no evidentiary support for the three primary allegations in the first amended complaint. The evidence was not overpowering, but it was enough to satisfy us that the superior court did not abuse its discretion in denying the motion. (See *Peake*, *supra*, 227 Cal.App.4th at p. 448 ["Because our adversary system requires that attorneys and litigants be provided substantial breathing room to develop and assert factual and legal arguments, sanctions

should not be routinely or easily awarded even for a claim that is arguably frivolous. Courts must carefully consider the circumstances before awarding sanctions."].)

The remaining arguments Rutman offers in support of his claim the court abused its discretion in denying the motion for sanctions crumble because they were contingent on this court agreeing that Kelly offered no evidence to support his three key allegations. For example, Rutman argues that the court abused its discretion in denying the motion as to Kelly because Kelly's opposition did not include any evidence. Yet, in making this argument, Rutman ignores the fact that Selik, who submitted an opposition on behalf of himself, did submit evidence. Therefore, that evidence was before the court, allowing it to evaluate the evidentiary support of the allegations. That Kelly did not file the evidence is not of the moment and does not show the court abused its discretion.

Likewise, we are not persuaded by Rutman's argument that sanctions were warranted because Selik did not engage in sufficient investigation or inquiry before filing the first amended complaint. Logically, under section 128.7, a claim that a plaintiff's attorney did not sufficiently investigate or inquire into a client's claim is of no consequence when a court specifically finds evidentiary support for the key allegations of the filed complaint. Alternatively stated, there was no need for further investigation because the allegations had some evidentiary support and were not sanctionable. For this reason alone, we find Rutman's argument wanting. However, we wanted to further discuss Selik's brief involvement in this matter because Rutman portrays Selik as an attorney who "stuck his head in the sand, took the word of an unstable client as opposed

to a respected member of the bar and performed no further inquiry." We do not believe the record supports Rutman's disparaging characterization of Selik.

Rutman's counsel sent Selik a letter dated May 30, 2018, stating Rutman would file a motion for sanctions under section 128.7 if Selik filed a first amended complaint on behalf of Kelly. The letter purported to attach certain evidence showing that Kelly could not maintain his allegations that Rutman: (1) had sex with K.E., (2) disclosed confidential information to K.E., and (3) improperly billed Kelly. The next day, Selik responded to the letter by email, noting:

> "Several weeks ago, I requested the defense provide certain information that would have proven [Kelly's] claims true or not true. The defense indicated they would confer with Mr. Rutman and advise [Kelly]. We never heard back. If defendant simply provides the information . . . , this matter may be able to be fully and completely put to rest. [¶] If actual evidence shows that the allegations are not true, I will recommend that [Kelly] dismiss his case and, upon that finding, if he fails to do so, I will withdraw."

Additionally, Selik took issue with the evidence provided by Rutman's counsel in her May 30 letter, noting it was unclear the documents were accurate and the information provided was incomplete ("The full text messages and full phone records would be telling.") Selik explained: "At this stage with the circumstantial evidence it cannot be said ' "any reasonable attorney would agree [it] is totally and completely without merit." ' " Selik asked for an additional 30 days to file the amended complaint, but Rutman declined the request.

It is unclear if Rutman ever provided the information that Selik requested. However, in opposing the motion for sanctions, Selik submitted his declaration wherein

he stated that he requested a "30-day continuance on any safe harbor time," but Rutman refused the request.[4] Selik further declared that had Rutman agreed to the extension "this was likely to have resolved the entire case, which may have taken the form of a settlement or withdrawal of the amended complaint."

We mention Selik's correspondence and declaration to provide some context to Selik's actions in this case. Selik does not appear to be an incalcitrant plaintiff's attorney, unwilling to listen to opposing counsel. To the contrary, he asked for additional information and time to further evaluate his client's claims before having to file the first amended complaint. Rutman refused, and the complaint was filed. We agree with the superior court that Rutman has not shown that Selik engaged in any sanctionable conduct under section 128.7.

Finally, we summarily reject Rutman's claim that Kelly filed the complaint in the instant action for an improper purpose, namely to avoid paying his legal fees. Rutman makes this assertion without any support except to repeat his argument that Kelly offered no evidence to support his allegation that Rutman had a sexual relationship with K.E. Having found that argument unpersuasive as discussed above, we lend it no credence in support of Rutman's final argument.

In summary, we conclude the superior court did not abuse its discretion in denying Rutman's motion for sanctions under section 128.7. The court's factual findings are supported by substantial evidence, and the court's application of the law to the facts was

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[4] We observe that at the time Selik filed his opposition to the motion for sanctions, he was no longer Kelly's counsel of record.

not arbitrary and capricious. (See *Haraguchi v. Superior Court*, *supra*, 43 Cal.4th at pp. 711-712.) On the record before us, Rutman did not show that Kelly's or Selik's conduct was objectively unreasonable (see *Peake*, *supra*, 227 Cal.App.4th at p. 440), and we conclude the superior court's denial of the motion did not amount to a manifest miscarriage of justice (see *Kurinij*, *supra*, 55 Cal.App.4th at p. 867).

II

COSTS ON THE JUDGMENT OF DISMISSAL

The superior court granted Rutman's demurrer to the first amended complaint without leave to amend. The court entered a judgment of dismissal in favor of Rutman on March 19, 2019, wherein the court declared that Kelly would "take nothing by way of" the first amended complaint. Kelly filed a memorandum of costs six days later, seeking $2,010.74. (See Cal. Rule of Court, rule 3.1700(a)(1) ["a prevailing party who claims costs must serve and file a memorandum of costs within 15 days after the date of service of the notice of . . . dismissal by the clerk . . . "].) Kelly did not serve a motion to tax costs, but the clerk did not add the fees to the judgment.

Rutman contends the superior court erred in not entering costs in his favor under section 1032.[5] We agree.

Section 1032 is the fundamental authority for awarding costs in civil litigation. (*Scott Co. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1108.) It establishes the general rule

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[5] This argument does not involve Selik. As such, he did not address it in his respondent's brief. Instead, this issue of costs is aimed solely at Kelly. However, Kelly did not file a respondent's brief in this matter.

that "[e]xcept as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (§ 1032, subd. (b).)

As our colleagues in Division Three of the Fourth District Court of Appeal explained, the 1986 reenactment of section 1032 "substantially changed the statutory framework for determining which parties are entitled to recover costs as a matter of right." (*Charton v. Harkey* (2016) 247 Cal.App.4th 730, 741 (*Charton*).) In *Charton*, the court reviewed the differences in former section 1032 and the current version of the statute: "[T]he current version of section 1032 provides for recovery of costs as a matter of right if the party fits one of the four prevailing party definitions listed in section 1032, subdivision (a)(4). The current statute no longer focuses on the nature of the lawsuit to distinguish between parties who are entitled to costs as a matter of right and those who may recover costs in the court's discretion. Instead, section 1032 now focuses on the nature of the prevailing party's victory—the party with a net recovery, a defendant in whose favor a dismissal is entered, a defendant when neither party obtains any relief, and a defendant against those plaintiffs who did not recover any relief against that defendant. If a party satisfies one of these four definitions of a prevailing party, the trial court lacks discretion to deny prevailing party status to that party. [Citations.]" (*Charton*, at p. 741.)

In contrast, where one of the four categories does not determine who is the prevailing party, the second sentence of section 1032, subdivision (a)(4) grants the trial court the discretion to determine the prevailing party and then allow costs or not, or to apportion costs. This prong of the statute operates as an express statutory exception to

the general rule that a prevailing party is entitled to costs as a matter of right. (*Charton, supra,* 247 Cal.App.4th at p. 738.)

Here, Rutman argues he is a "prevailing party" under section 1032, subdivision (a)(2). We agree. Kelly obtained no relief against him and a judgment of dismissal was entered in Rutman's favor. Rutman was entitled to his costs. He filed a memorandum of costs. As soon as the time expired by when Kelly was to file a motion to tax costs, the clerk should have entered the costs in the judgment. (Cal. Rules of Court, rule 3.1700(b)(4).) The judgment therefore must be reversed to correct this error.

DISPOSITION

The judgment is reversed and remanded to the superior court with instructions to amend the judgment to include Rutman's costs only. In all other respects, the judgment is affirmed as we found the court did not abuse its discretion in denying Rutman's motion for sanctions. In the interest of justice, the parties are to bear their own costs.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

IRION, J.